Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

RESEARCH TRIANGLE INSTITUTE,
Petitioner,

vs.

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, consisting of Alan Greenspan in his official capacity as chairman, and Edward W. Kelley, Jr., Lawrence B. Lindsey, Susan M. Phillips and Janet Yellen in their capacities as members of the Board of Governors; and THE UNITED STATES OF AMERICA.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In ruling that sovereign immunity barred petitioner's contractual claim against the respondents Board of Governors of the Federal Reserve System and the United States of America, did the Court below disregard and misconstrue the statutes and decisions which establish that this defense had been waived?

PARTIES TO THE PROCEEDING

Petitioner, Research Triangle Institute ("RTI"), is a non-profit corporation, established by the University of North Carolina at Chapel Hill, North Carolina State University and Duke University. RTI has no parent company and no subsidiaries.

The Respondents are as stated in the caption.

TABLE OF CONTENTS

Page

Question Presented ..... *i*

Parties to the Proceeding ..... *ii*

Table of Contents ..... *iii*

Table of Citations ..... *iv*

Opinions Below 1

Statement of Jurisdiction 1

Statues Involved In This Case 1

Statement of the Case 4

Reasons for Granting the Writ 6

I. The Petition Should Be Granted Because the Lower Court's Opinion Conflicts with this Court's Decisions as to the Scope of Sovereign Immunity 6

II. The Petition Should be Granted Because the Lower Court's Opinion Conflicts with Those of Other United States Courts of Appeal .. 13

III. The Petition Should Be Granted Because of the Importance of Resolving Uncertainty as to the Scope of Sovereign Immunity in the Contracts of Proliferating Executive Agencies 16

Conclusion 18

TABLE OF CITATIONS

Cases Cited:

Federal Housing Authority v. Burr,
309 U.S. 242 (1944) 7, 8, 10

Federal Deposit Insurance Company v. Meyer,
510 U.S. 471 (1994) 6, 7, 10

General Railway Signal Co. v. WMATA,
875 F.2d 320 (D.C. Cir. 1989) 14

L'Enfant Plaza Properties, Inc. v. United States,
668 F.2d 1211 (Ct.C. 1982) 14, 15, 16

Loeffler v. Frank, 486 U.S. 549 (1988) 6, 10

McDonald's Corporation v. United States,
926 F.2d 1126 (Fed. Cir. 1991) 13

Research Triangle Institute v. The Board of Governors of the Federal Reserve System,
132 F.3d 985 (4th Cir. 1997) 1

Research Triangle Institute v. The Board of Governors of the Federal Reserve System,
962 F.Supp. 61 (M.D.N.C 1997) 1

United States v. Winstar Corporation, et. al.,
518 U.S. 839 (1996) 8, 9, 16

Statutes Cited:

5 U.S.C. § 104 ..... 9, 16

12 U.S.C. §§ 221 *et. seq.* 4

12 U.S.C. § 222 4

12 U.S.C. § 241 ..... 4, 10

12 U.S.C. § 243 ..... 1, 4, 10

12 U.S.C. § 244 ..... 2, 10

12 U.S.C. § 248 ..... 2, 10

12 U.S.C. § 248a 4

12 U.S.C. § 248(p) 10

12 U.S.C. § 252 5

12 U.S.C. § 321 4

12 U.S.C. § 341 3

12 U.S.C. §§ 1811 *et. seq.* 4

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1292(d)(4) 16

41 U.S.C. § 252 10

41 U.S.C. § 601 ..... 9, 10

41 U.S.C. § 602(a) 9

41 U.S.C. § 609 10

United States Constitution Cited:

Article II, Section 2, clause 2 16

APPENDIX

Appendix A - Opinion of the United States Court of Appeals for the Fourth Circuit Filed December 29, 1998 ..... 1a

Appendix B - Opinion of the United States District Court for the Middle District of North Carolina Filed February 14, 1997 ..... 13a

Petitioner, Research Triangle Institute ("RTI"), respectfully requests that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on December 29, 1997.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at *Research Triangle Institute v. The Board of Governors of the Federal Reserve System*, 132 F.3d 985 (4th Cir. 1997) (App. A). The opinion of the district court is reported in *Research Triangle Institute v. The Board of Governors of the Federal Reserve System*, 962 F.Supp. 61(M.D.N.C 1997) (App. B).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on December 29, 1997. On March 20, 1998, the Supreme Court of the United States extended the time within which to file a petition for a writ of certiorari in this case to and including April 28, 1998.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

12 U.S.C. § 243 provides:

> The Board of Governors of the Federal Reserve System shall have power to levy semiannually upon the Federal reserve banks, in proportion to their capital stock and surplus, an assessment sufficient to pay its estimated

> expenses and the salaries of its members and employees for the half year succeeding the levying of such assessment, together with any deficit carried forward from the preceding half year, and such assessments may include amounts sufficient to provide for the acquisition by the Board in its own name of such site or building in the District of Columbia as in its judgment alone shall be necessary for the purpose of providing suitable and adequate quarters for the performance of its functions....

12 U.S.C. § 244 provides:

> The principal offices of the Board shall be in the District of Columbia. At meetings of the Board the chairman shall preside, and, in his absence, the vice chairman shall preside. In the absence of the chairman and the vice chairman, the Board shall elect a member to act as chairman pro tempore. The Board shall determine and prescribe the manner in which its obligations shall be incurred and its disbursements and expenses allowed and paid, and may leave on deposit in the Federal Reserve banks the proceeds of assessments levied upon them to defray its estimated expenses and the salaries of its members and employees, whose employment, compensation, leave, and expenses shall be governed solely by the provisions of this chapter and rules and regulations of the Board not inconsistent therewith; and funds derived from such assessments shall not be construed to be Government funds or appropriated moneys....

12 U.S.C. § 248 provides:

> The Board of Governors of the Federal Reserve System

shall be authorized and empowered:

(a) ...

(j) **Exercising supervision over reserve banks**

To exercise general supervision over said Federal reserve banks.

...

(p) **Authority**

The Board may act in its own name and through its own attorneys in enforcing any provision of this title, regulations promulgated hereunder, or any other law or regulation, or in any action, suit, or proceeding to which the Board is a party and which involves the Board's regulation or supervision of any bank, bank holding company (as defined in section 1841 of this title), or other entity, or the administration of its operations.

12 U.S.C. § 341 provides:

Upon the filing of the organization certificate with the Comptroller of the Currency a Federal Reserve bank shall become a body corporate and as such, and in the name designated in such organization certificate, shall have power –

First. To adopt and use a corporate seal.

Second. To have succession after February 27, 1927, until dissolved by Act of Congress or until forfeiture of franchise for violation of law.

Third. To make contracts.

Fourth. To sue and be sued, complain and defend, in any court of law or equity.

...

STATEMENT OF THE CASE

Petitioner Research Triangle Institute ("RTI") is a non-profit corporation headquartered at the Research Triangle Park in North Carolina and organized by the University of North Carolina at Chapel Hill, North Carolina State University, and Duke University. Its purpose is to perform scientific research and prepare studies and reports. The Respondent Board of Governors controls the Federal Reserve System which was originally established in 1913.[1] The Board is composed of seven full-time members appointed by the President, by and with the advice and consent of the Senate, for terms of fourteen years. 12 U.S.C. § 241. The United States is divided into Federal Reserve Districts, each of which has a Federal Reserve Bank. 12 U.S.C. § 222. Every national bank must become a member bank of the Federal Reserve System by subscribing and paying for stock in the Federal Reserve Bank of its district.[2] 12 U.S.C. § 222. State banks may also become members of the Federal Reserve System pursuant to such rules and regulations as the Board of Governors may prescribe. 12 U.S.C. § 321.

The Board levies assessments semi-annually upon the Federal Reserve Banks, in proportion to their capital stock and surplus, in amounts sufficient to pay estimated expenses and salaries of the Board's members and employees for the next half year. 12 U.S.C. § 243. The Federal Reserve Banks obtain funds to pay these assessments and the Banks' other expenses from fees for their services, which are priced according to a schedule prescribed by the Board. 12 U.S.C. § 248a.

On November 3, 1987, the Board issued a Request for

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[1]The Federal Reserve System is the subject of Sections 221-522 of Title 12 of the United States Code.

[2]Thereupon the national bank also becomes an insured bank under the Federal Deposit Insurance Act, 12 U.S.C. §§ 1811 *et seq.*

Proposal for a National Survey of Small Business Finances. According to the Request, the Board was seeking a contractor to make a survey of diverse small businesses and to compile information about their sources of financing.[3] After a fixed price contract had been awarded to RTI on February 2, 1988, the Board changed some of its contract requirements, requested extra work beyond that originally contemplated by the parties, and failed to provide the support called for by the contract.

Because of the Board's numerous changes in the contract requirements, RTI made a timely request for an equitable adjustment in the manner specified by its contract with the Board. When the requested equitable adjustment was denied, RTI pursued unsuccessfully a multi-step administrative appeal. Finally, on May 5, 1990, J. Virgil Mattingly Jr., General Counsel to the Board, wrote to RTI that, "Your claim has been considered and denied by the full Board of Governors. This denial represented final agency action and was transmitted to you by letter dated February 12, 1990. At that time you exhausted all administrative remedies before the Board of Governors. If you wish to pursue your claim, you may file a complaint with the appropriate federal district court."

After further fruitless discussions with the Board, RTI sued the Respondents in the District Court to obtain payment of the unforeseen costs which had given rise to the request for an equitable adjustment. Thereafter on motion of the

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[3]Although not in effect at the time of Request for Proposal, 12 U.S.C. § 252 now provides that not later than twelve months after September 30, 1996 and once every sixty months thereafter the Board, "shall conduct a study and submit a report to the Congress detailing the extent of small business lending by all creditors." The contents of this study are prescribed by the statute. See Pub.L. 104-208, Div. A, Title II, Sec. 2227, Sept. 30, 1996, 110 Stat. 3009-417. This statute confirms implicitly that the Board's action in requesting proposals for the Survey of Small Business Finances was within the authority of the Board and consistent with Congressional intent.

Respondents, the complaint was dismissed on grounds of sovereign immunity. Petitioner appealed the adverse decision. In turn, the Court of Appeals affirmed the dismissal. Petitioner now seeks a writ of certiorari to review the correctness of the dismissal on grounds of sovereign immunity.

REASONS FOR GRANTING THE WRIT

I. The Petition Should Be Granted Because the Lower Court's Opinion Conflicts with this Court's Decisions as to the Scope of Sovereign Immunity.

The premise for the opinion in the Court of Appeals is that a waiver of sovereign immunity must "be clear, express, and unequivocal" and that acts of the sovereign which "imply" or are "equivalent" to a waiver of immunity must be disregarded. (App. 12a). However accurate this premise may be with respect to liability for torts or regulatory activity, it is at odds with this Court's precedents concerning "commercial" contracts of governmental agencies.

Thus, in *Federal Deposit Insurance Company v. Meyer*, 510 U.S. 471 (1994), this Court was concerned with statutory language that authorized the FDIC to "sue and be sued." In the context of the activity involved, the Court ruled that the statute was to be liberally construed despite the usual rule of strict construction in determining whether sovereign immunity has been waived.

In *Meyer*, the Court cited as a precedent *Loeffler v. Frank*, 486 U.S. 549 (1988) which concerned a suit against the Postal Service – another "agency" of the United States. There the Court had ruled that a statutory grant to the Postal Service of authority to "sue and be sued" should be liberally construed to constitute a waiver of sovereign immunity. As part of its rationale for the liberal construction, the Court pointed out that

Congress had launched the Postal Service into the commercial world and given it the status of a private commercial enterprise. That status would be inconsistent with holding that sovereign immunity had not been waived as to its activities.

In *Meyer*, this Court also cited *Federal Housing Authority v. Burr*, 309 U.S. 242 (1944), where "to-sue-and-be-sued" language had likewise been liberally construed. In language that has never been repudiated by this Court, it was stated:

> As indicated in *Keifer & Keifer v. Reconstruction Finance Corp.*, [306 U.S. 381], we start from the premise that such waivers by Congress of governmental immunity in case of such federal instrumentalities should be liberally construed. This policy is in line with the current disfavor of the doctrine of governmental immunity from suit, as evidenced by the increasing tendency of Congress to waive the immunity where federal governmental corporations are concerned. *Keifer & Keifer v. Reconstruction Finance Corp., supra.* Hence, when Congress establishes such an agency, authorizes it to engage in commercial and business transactions with the public, and permits it to "sue and be sued," it cannot be lightly assumed that restrictions on that authority are to be implied. Rather if the general authority to "sue and be sued" is to be delimited by implied exceptions, it must be clearly shown that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the "sue and be sued" clause in a narrow sense. In the absence of such showing, it must be presumed that when Congress

> launched a governmental agency into the commercial world and endowed it with authority to "sue or be sued," that agency is not less amenable to judicial process than a private enterprise under like circumstances would be.

Id. at p. 245.

Of special relevance to the present case is this passage from the Court's opinion in *Burr*:

> There is some point made of the fact that suit was brought against the Federal Housing Administration rather than against the Administrator. But when the statute authorizes suit by or against the Administrator "in his official capacity" we conclude that that permits actions by or against the Federal Housing Administration, since by express terms of the Act all of the powers of the latter "shall be exercised" by him. Hence, action by him in the name of the Federal Housing Administration would be action in his official capacity.

Burr, at 249-50.

Also relevant here is the recent refusal of the Supreme Court to apply the doctrine of "sovereign act" in a way that would have contradicted the reasonable expectations of many financial institutions. *United States v. Winstar Corporation, et. al.*, 518 U. S. 839 (1996). There the plurality opinion pointed out,

> If... contracts are made in reliance on the law of contract and without specific provision for default mechanisms, should all the private contractors be denied a remedy for damages unless they satisfy the unmistakability doctrine? The answer is obviously no

> because neither constitutional avoidance nor any apparent need to protect the government from the consequences of standard operations could conceivably justify applying the doctrine. Injecting the opportunity for unmistakability litigation into every common contract action would, however, produce the untoward result of compromising the Government's practical capacity to make contracts, which we have held to be 'of the essence of sovereignty' itself. *United States v. Bekins*, 304 U.S. 27, 51-52 (1938). From a practical standpoint, it would make an inroad on this power, by expanding the Government's opportunities for contractual abrogation, with the certain result of undermining the Government's credibility at the bargaining table and increasing the cost of its engagements. As Justice Brandeis recognized, '[p]unctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors.' *Lynch v. United States*, 292 U.S. 571, 580 (1934).

Winstar, pp. 2459-2460 (footnotes omitted). Although *Winstar* concerned the doctrine of "sovereign act," its rationale as to the government's credibility at the bargaining table and the "credit of public as well as private debtors" argues also against the application of "sovereign immunity" in a way that compromises public credit and "the government's practical capacity to make contracts."

Now that the relevant principles to be considered with respect to sovereign immunity have been set out, the next step is to examine the statutes which relate to the Board of Governors. 41 U.S.C. § 601, which concerns contract disputes, defines "executive agency" to include " an independent establishment as defined by section 104 of Title 5 . . ." In turn, 5 USC § 104 states that "independent establishment" means

"an establishment in the executive branch ... which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment."[4] As an "executive agency", the Board is subject to the procurement procedures prescribed by Congress. 41 U.S.C. § 252. Likewise, as an "executive agency," the Board is subject to the statutory procedures for resolving "contract disputes." 41 U.S.C. § 601(2). If the contract dispute is not resolved otherwise, suit may be instituted in the United States Court of Federal Claims. 41 U.S.C. § 609.

Unlike executive departments, the Board relies not on funds appropriated by Congress but instead on semi-annual assessments against the Federal Reserve Banks for estimated expenses. 12 U.S.C. § 243. Those funds "shall not be construed to be government funds or appropriated moneys." 12 U.S.C. § 244. Each Federal Reserve Bank is authorized by Congress to "make contracts" and "to sue and be sued, complain and defend, in any court of law or equity." 12 U.S.C. § 241. This Court's opinions in *Meyer*, *Loeffler* and *Burr*, all supra, make clear that this language constitutes a broad waiver of sovereign immunity. On the other hand, the enumerated powers granted to the Board do not include either the power to make contracts or to sue and be sued. 12 U.S.C. 248. Thus, the Board has been directed as an "executive agency" to follow procurement procedures and is subject to a procedure for resolving contract disputes with "judicial review" available; but the Board is not specifically authorized by statute either to make contracts or to

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[4]The "Federal Reserve System" -- including the Board and the Federal Reserve Banks -- is listed as one of the "Independent Establishments and Government Corporations" in *The United States Government Manual* promulgated by the Office of the Federal Register, National Archives and Records Administration.

sue and be sued.[5]

Two alternative views are available in determining from the statutes whether sovereign immunity bars Petitioner's claim. The first is that the Board lacked any authority from Congress either to request proposals or to enter a contract in its own name, because no such authority is contained in the statute which enumerates its specific powers. Indeed, according to this view, the Board had no authority to enter any contract whatsoever in its own name – whether a lease of space, a contract with a consultant for a study or report, or an agreement for some other type of service. On the other hand, a Federal Reserve Bank may enter whatever contract it chooses and, in the event of breach, may sue or be sued on that contract in an appropriate district court.

In that event, a person who negotiates a contract with the Federal Reserve Board has placed himself or herself in a trap. Indeed, the Board – presumably unwittingly – was deceiving RTI and other prospective bidders when it requested proposals for a contract and thereby implicitly represented that it had authority to enter a contract, so that – as is true of commercial contracts generally – the other party could sue in the event of

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[5]However, 12 U.S.C. § 248(p) contains the provision that:

> The Board may act in its own name and through its own attorneys in enforcing any provision of this title, regulations promulgated hereunder, or any other law or regulation, *or in any action, suit, or proceeding, to which the Board is a party and which involves the Board's* regulation or supervision of any bank, bank holding company (as defined in section 1841 of this title), or other entity, or the *administration of its operations*.

(emphasis added). Obviously Congress anticipated that the Board might be a party to litigation involving the "administration of its operations" -- even though it gave no express power for the Board to enter contracts concerning such "administration."

failure by the Board to comply with its contractual obligations.[6]

The second approach is much more consistent with this Court's opinions, as well as with fundamental fairness and the reasonable expectations of the parties. It relies, in part, on the language that subjects the Board as an "executive agency" to the same procurement procedures that apply to executive departments and to the procedures Congress has provided for resolving contract disputes -- including commencement of actions in the United States Court of Federal Claims. It infers from this language that Congress intended the Board to be subject to suit as an "executive agency" in the Court of Federal Claims, in which event a judgment would be paid out of funds appropriated by Congress.

The second approach also relies on the statutory language authorizing the Federal Reserve Banks to "sue and be sued" -- which language has been repeatedly interpreted by this Court as a broad waiver of sovereign immunity. If a Federal Reserve Bank is sued successfully for breach of contract, the judgment is paid out of the non-appropriated funds received by the Bank for its services. These same funds provide the usual source for paying the expenses of the Board -- this payment being accomplished by semi-annual levies of estimated expenses. These are funds as to which Congress has waived sovereign immunity in the hands of the Banks -- without providing in any way that they would become clothed in sovereign immunity when they are turned over.

Under these circumstances the applicable statutes should

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[6]This view implies that Petitioner RTI should be pleased to have received pay for its services because the Board, having acted without statutory authority, could not have been forced by a court to perform any of its obligations, express or implied, under the purported contract. This, in turn, might have ramifications as to the personal liability to RTI of the individuals who executed the contract on the Board's behalf without any statutory authority to do so.

be construed together to mean that when the Board chooses to enter a contract in its own name for purposes authorized by Congress – with the obvious expectation that its obligations under the contract will be paid out of funds provided by the Federal Reserve Banks as to which sovereign immunity has been specifically waived by statute – the Board is precluded from claiming sovereign immunity if it is sued for failure to make the payments called for by the contract.

The situation here is very similar to that involved in *Burr* where, although the statute authorized the suit by or against the "Federal Housing Administrator," this Court permitted an action to be maintained against the "Federal Housing Administration." Unless some reasonable interpretation is given to the scope of a waiver of sovereign immunity, the result will inevitably be injury to the credibility and the credit of the government and its agencies. The result is contrary to the teachings of this Court.

II. The Petition Should be Granted Because the Lower Court's Opinion Conflicts with Those of Other United States Courts of Appeal.

Analogous to the present case is *McDonald's Corporation v United States*, 926 F.2d 1126 (Fed. Cir. 1991), where the Court of Appeals rejected a technical interpretation which would have defeated statutory intent by allowing sovereign immunity to be plead when a contract had been entered in the name of NAVRESSO, an entity not specified in the Tucker Act, but clearly included within its intent. NAVRESSO had been created by the Navy to help procure goods and services for Navy Exchanges, but was not itself an exchange. The express statutory waiver of sovereign immunity as to non-appropriated fund instrumentalities refers only to military and Navy exchanges. However, the Navy exchanges were providing the funds from which it was intended that payments would be made pursuant to contracts entered by

NAVRESSO. Under these circumstances the Federal Circuit held that the waiver of sovereign immunity extended to the new organization not specified by statute.

The Court below distinguished *McDonald's* from the present case on the ground that the Board is separately established by statute, while the organization created by the Navy had no separate statutory basis. However, the Board of Governors is part of the Federal Reserve System which is the subject of a separate Chapter of the United States Code. The funds for that System are provided by the Federal Reserve Banks, as to which sovereign immunity has been specifically waived. Thus, the situation is quite analogous to that of NAVRESSO, which coordinated the procurement activities if individual Navy Exchanges scattered across the world and is sustained by the non-appropriated funds these exchanges generate.[7]

If this Court were to conclude however, that the Board itself could not be sued in a district court, Petitioner RTI submits that Tucker Act liability exists on the part of the United States. The lower courts' rejection of this liability conflicts with the result and rationale of *L'Enfant Plaza Properties, Inc. v. United States*, 668 F.2d 1211 (Ct.Cl. 1982). At issue there was the liability of the United States in an action brought in the Court of Claims for payments due under a lease of office space entered by the Comptroller of the Currency. The Comptroller is supported by funds of regulated banks in much the same manner that the

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[7]The rationale of the lower court is also at odds with decisions that an equitable adjustment clause in a government contract constitutes a waiver of sovereign immunity that might otherwise exist as to interest. *General Railway Signal Co. v. WMATA*, 875 F.2d 320 (D.C. Cir. 1989). Here the contract prepared by the Board pursuant to the requirements of the applicable statutes and regulations contained an "equitable adjustment" clause. The Board's entry into a contract which it prepared and which contained such a clause should itself be construed as a waiver by the Board of sovereign immunity as to the contract.

Board of Governors is supported by assessments against the Federal Reserve Banks. Because the funds from this source had been adequate, Congress had not appropriated funds for the Comptroller since 1947. Nonetheless, the Court of Claims ruled that the United States could still be held liable.

As the Court of Claims explained:

> The fact that the Comptroller has been financially self-sufficient is not dispositive. There must be a clear expression by Congress that the agency was to be separated from general federal revenues. *Breitbeck*, 205 Ct.Cl. at 212-13, 500 F.2d at 559. See *United States v. Hopkins*, 427 U.S. 123, 125, 96 S.Ct. 2508, 2510, 49 L.Ed.2d 361 (1976)(non-appropriated fund agency characterized as one denied by the Government any use of appropriated monies). Congress must have intended that the activity resulting in the claim was not to receive or be funded from appropriated funds. *Hughes Aircraft Co. v. United States*, 209 Ct. Cl. 446, 476, 534 F.2d 889, 907-08 (1976). To sustain jurisdiction here, the requirement is not that appropriated funds have been used for the activity but that under the agency's authorizing legislation Congress could appropriate funds if necessary. *Convery v. United States*, 220 Ct.Cl. ------, ------, 597 F.2d 727, 730 (1979); *De Mauro Constr. Corp. v. United States*, 215 Ct.Cl. 364, 375, 568 F.2d 1322, 1328 (1978). Jurisdiction under the Tucker Act must be exercised absent a firm indication by Congress that it intended to absolve the appropriated funds of the United States from liability for acts of the Comptroller. [Cites omitted]
>
> This limited application of the exception to our broad jurisdiction is consistent with the underlying policy of the rule excluding non-appropriated-agencies from our jurisdiction of not wanting to impose "an

> unauthorized burden on the public treasury." *Hughes*, 209 Ct.Cl. At 483-84, 534 F.2d at 912.
>
> The legislation governing this case does not preclude Congressional appropriation of funds to the Comptroller.

Id. at 1212.

Just as no statute precludes Congress from making appropriations to defray expenses and pay obligations of the Comptroller of the Currency, even though that office is regularly supported by assessments of regulated banks, Petitioner is unaware of any statute that precludes Congress from making appropriations to pay the expenses and obligations of the Board of Governors -- who, according to 5 U.S.C. § 104, constitute an "executive agency." Moreover, like the Comptroller the members of the Board of Governors are "officers" appointed pursuant to the Appointments Clause of the United States Constitution. Art. II, § 2, cl. 2. Petitioner submits that *L'Enfant Plaza* stands for the proposition that Tucker Act liability can be imposed with respect to such officers; and the lower courts' failure to apply that principle to the Board of Governors was in conflict with the decision by the Court of Claims.

Insofar as the action against the United States is concerned, the case could be transferred by the District Court to the United States Court of Federal Claims. Cf. 28 U.S.C. § 1292(d)(4). This would be especially appropriate since RTI proceeded in the manner set out in the letter to it from the Board's General Counsel.

III. The Petition Should Be Granted Because of the Importance of Resolving Uncertainty as to the Scope of Sovereign Immunity in the Contracts of Proliferating Executive Agencies.

In order to perform their duties properly in an ever-

changing world with an ever-increasing number of executive agencies, those agencies must contract for property or services that at one time might have been provided internally by the government. Thus, government-related activities may be performed in leased space, rather than in government-owned space; and services and information may be obtained from outside consultants, rather than furnished by federal employees. Under these circumstances – as *Winstar* reaffirms – it is important that agreements made on behalf of federal agencies have credibility. If doctrines such as "sovereign immunity" or "sovereign act" are misapplied in ways that defy the reasonable expectations of potential contractors and violate principles of fairness, the ability of the Government to enter into necessary contracts will be impaired.[8]

Petitioner submits that such a misapplication of doctrine has occurred in the case at hand. Perhaps the best evidence thereof is the letter to RTI from the Board's own General Counsel wherein he advised that all administrative remedies had been exhausted and "you may file a complaint with the appropriate federal district court." Petitioner does not assert that this letter constituted a waiver of sovereign immunity. However, it reveals that the Board's own legal adviser reasonably assumed that a contract entered by the Board was no more subject to sovereign immunity than a contract entered by a Federal Reserve Bank, as to which sovereign immunity has been expressly waived by statute.

It is important for the Government's credit and its ability to enter contracts that this Court grant a writ of certiorari and make clear that sovereign immunity will not be turned into a trap for those who deal in good faith with the Government and its

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[8]On the other hand, no government interest can be impaired by imposing liability on the Board which can then obtain funds for payment from its levies against the nonappropriated funds of the Federal Reserve Banks as to which sovereign immunity has been specifically waived.

agencies.[9] Moreover, it is important that this Court disavow any claim by a federal agency that it may negotiate and execute a contract and then utilize the doctrine of sovereign immunity to prevent its enforcement by the other party.[10]

CONCLUSION

The petition for certiorari should be granted to review the failure of the court below to apply properly the precedents of this Court and to resolve a conflict with other courts of appeal.

Respectfully submitted,

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[9]The importance of the issue here is reflected by the circumstance that the opinions of both the Court of Appeals and the District Court have been published.

[10]The principle of mutuality would also suggest that a contract unenforceable against a federal agency would be enforceable by that agency.

APPENDIX A- OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH DISTRICT FILED DECEMBER 29, 1997

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

RESEARCH TRIANGLE INSTITUTE,
Plaintiff-Appellant,
v.
The BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
consisting of
Alan Greenspan in his official capacity as chairman, and Edward W. Kelley, Jr., Lawrence B. Lindsey, Susan M. Phillips and Janet L. Yellen in their capacities as members of the Board of Governors; UNITED STATES OF AMERICA,
Defendants-Appellees.

No. 97-1282.

Appeal from the United States District Court for the Middle District of North Carolina, at Durham. Frank W. Bullock, Jr., Chief District Judge.
(CA-96-102-1)

Argued: Oct. 30, 1997.
Decided: Dec. 29, 1997.

Before RUSSELL, NIEMEYER, and WILLIAMS, Circuit Judges.

Affirmed by published opinion, Judge Russell wrote the opinion, in which Judge Niemeyer and Judge Williams joined.

COUNSEL

ARGUED: Robinson Oscar Everett, Everett & Everett, Durham, NC, for Appellant. Bradford Scott Fleetwood, Senior Attorney, Washington, DC, for Appellee Board of Governors; Gill Paul Beck, Assistant United States Attorney, Greensboro, NC, for Appellee United States. ON BRIEF: Sandra G. Herring, Everett & Everett, Durham, NC, for Appellant. James V. Mattingly, Jr., General Counsel, Richard M. Ashton, Associate General Counsel, Katherine H. Wheatley, Assistant General Counsel, Washington, DC, for Appellee Board of Governors; Walter C. Holton, Jr., United States Attorney, Greensboro, NC, for Appellee United States.

OPINION

RUSSELL, Circuit Judge:

This appeal presents a single question of law: whether the Board of Governors of the United States Federal Reserve System (the "Board") can be sued in contract in federal court. The district court found that the doctrine of sovereign immunity shielded the Board from contract suits in federal court and dismissed this case for lack of subject matter jurisdiction. Because we can find neither an express waiver of sovereign immunity in the Board's governing statutes nor the Board's inclusion in a more general Congressional waiver of immunity, we agree with the district court's finding, and affirm its dismissal of the case.

I.

A.

Appellant Research Triangle Institute ("RTI") is a nonprofit scientific research organization headquartered in Research

Triangle Park, North Carolina. RTI sued the Board in the United States District Court for the Middle District of North Carolina, seeking reimbursement for unforeseen costs incident to a contract that required RTI to perform a survey of the institutions and geographic areas from which small businesses obtain financial services. The fixed contractual price for RTI's services was $572,763, but in May of 1989, nearly a year after the contract was awarded, RTI sought an equitable adjustment in the amount of $284,079. The Board denied the adjustment in February 1990, and RTI brought suit. On February 14, 1997, the district court dismissed the case for lack of subject matter jurisdiction.[1] This appeal followed.

B.

> As stated above, the district court dismissed this case for lack of subject matter jurisdiction based on its finding that the doctrine of sovereign immunity protected the Board from suit. Because the existence of sovereign immunity is a question of law, we review this determination de novo.[2]

With regard to the federal government and its instrumentalities, sovereign immunity is presumed and cannot be overcome without an express and unequivocal statutory waiver.[3] Further, any statutory waiver is strictly construed,

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[1]Research Triangle Inst. v. Board of Governors, 962 F.Supp. 61 (M.D.N.C.1997).

[2]Mulcahey v. Columbia Organic Chems. Co., 29 F.3d 148, 151 (4th Cir.1994).

[3]Lane v. Pena, 116 S.Ct. 2092, 2096, (1996).

with all ambiguities resolved in favor of the sovereign.[4]

The jealous protection of the sovereign from suit is deeply rooted in the common law[5] and has been considered a part of the plan of our Constitution since before its ratification. In arguing for the Constitution's organization of the judicial branch, Alexander Hamilton wrote that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent,"[6] and further inferred from this precept that "[t]he contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force."[7] In Kawananakoa v. Polyblank,[8] Justice Holmes reaffirmed the doctrine of sovereign immunity "not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."[9]

More recently, the Supreme Court emphasized the strict requirements for a waiver of this immunity, stating that such a waiver "must be unequivocally expressed in [the] statutory

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[4]Id.

[5]See Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 437-47, (1793) (Iredell, J., tracing the doctrine of sovereign immunity forward from the time of Edward I).

[6]The Federalist No. 81, at 511 (Alexander Hamilton) (Benjamin F. Wright ed., 1961) (emphasis original).

[7]Id.

[8]205 U.S. 349, (1907).

[9]Kawananakoa v. Polyblank, 205 U.S. 349, 353, (1907).

text,"[10] and that, as stated above, "a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." [11] In addition, the Court has also interpreted this broad measure of protection as extending not only to more traditional governmental entities, but to all agencies of the federal government.[12]

A waiver of federal sovereign immunity can be found in one of two places: in the specific statute governing a governmental entity, or in one of the broad waivers of immunity made by Congress for certain classes of federal agencies. The Tucker Act[13] and the Contract Disputes Act [14] are examples of the latter type of waiver. In each statute, Congress explicitly waived sovereign immunity with regard to contract actions against certain federal agencies and placed jurisdiction over those actions in the United States Court of Federal Claims. However, unless these statutes specify otherwise, they apply only to agencies that operate using appropriated funds, and as a result they do not waive immunity from contract actions for allagencies.[15]

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[10]Lane, 116 S.Ct. at 2096.

[11]Id.

[12]See, e.g., FDIC v. Meyer, 510 U.S. 471, 475, (1994).

[13]28 U.S.C.A. §§ 1491-1509 (1994 & West Supp.1997).

[14]41 U.S.C.A. §§ 601-13 (1987 & West Supp.1997).

[15]The relevant section of the United States Code states in part that "[e]very final judgement rendered by the United States Court of Federal Claims against the United States shall be paid out of any general appropriation therefor...." 28 U.S.C.A. § 2517 (West Supp.1997). This provision is generally read as limiting Tucker Act claims to contracts "which could have been satisfied out of appropriated funds." Kyer v. United States,

II.

A.

In arguing that the Board is subject to a waiver of sovereign immunity, RTI first relies on the Tucker Act case of McDonald's Corp. v. United States.[16] In McDonald's, an independent contractor sued the Navy Resale and Services Support Office ("NAVRESSO"), an agency responsible for supervising certain aspects of the Navy's exchanges, for breach of contract. The Claims Court dismissed for lack of jurisdiction, stating that the Tucker Act did not expressly include NAVRESSO's predecessor agency within its waiver of sovereign immunity for the nation's military exchanges. The United States Court of Appeals for the Federal Circuit disagreed, holding that the Tucker Act's waiver of immunity included NAVRESSO because NAVRESSO's supervisory activities fell "within the ambit of 'a post exchange type of

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177 Ct.Cl. 747, 369 F.2d 714, 718 (1966). In United States v. Hopkins, 427 U.S. 123, 96 S.Ct. 2508, 49 L.Ed.2d 361 (1976), the Supreme Court considered a contract action against the Army and Air Force Exchange Service ("AAFES"), a "nonappropriated fund instrumentality," that was brought within the scope of the Tucker Act's waiver of sovereign immunity by an express amendment, now part of 28 U.S.C. § 1491(a)(1). The Court held that the amendment was clearly designed "to afford contractors a federal forum in which to sue nonappropriated fund instrumentalities [the military exchanges] by doing away with the inequitable 'loophole' in the Tucker Act," id. at 126, 96 S.Ct. at 2510 (internal citations omitted), and affirmed jurisdiction. Nevertheless, the Court left undisturbed the general "appropriated fund instrumentality" limitation on the Tucker Act's grant of jurisdiction. As for the Contract Disputes Act, the only non-appropriated fund activities it contemplates are those "described in sections 1346 and 1491 of Title 28." 41 U.S.C.A. § 602(a) (West 1994).

[16]926 F.2d 1126 (Fed.Cir.1991).

operation.' "[17]

RTI relies upon McDonald's for the purpose of drawing a parallel. RTI argues that, just as NAVRESSO was brought within the pale of the Tucker Act's waiver of immunity for Navy exchanges because of its close association with that entity, the Board, for which there is no express statutory waiver of immunity, should be included within the waiver for the Federal Reserve banks provided by 12 U.S.C. § 341. We disagree.

McDonald's inclusion of NAVRESSO in the Tucker Act's waiver of sovereign immunity for Navy exchanges is patently distinguishable from RTI's argument that the Board should be included in the statutory waiver of immunity as to federal reserve banks. As McDonald's made clear, NAVRESSO is an entity established by the Navy itself, as well as one whose organization and function has changed as the Navy exchange system has evolved.[18] By contrast, the Board has an expressly independent statutory existence from the Federal Reserve banks it oversees. Subchapter II of 12 U.S.C. mandates the creation of the Board, and enumerates its powers,[19] which, the Board notes, primarily involve the regulation of the "member" banks of the Federal Reserve System and the establishment of general monetary policy. There is no mention of any ability to sue or be sued with regard to the Board in Subchapter II. However, separate subsequent subchapters and the sections therein deal

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[17]McDonald's Corp. v. United States, 926 F.2d 1126, 1133 (Fed.Cir.1991) (quoting S.Rep. No. 91-259, at 2 (1969)).

[18]Id. at 1127-28.

[19]12 U.S.C.A. §§ 241-250 (1987 & West Supp.1997).

with the creation of the independent Federal Reserve banks and establish their powers, including the power "[t]o make contracts" and "[t]o sue and be sued, complain and defend, in any court of law or equity."[20]

Thus, in attempting to equate this situation with McDonald's, RTI asks us to conflate the powers of two expressly independent statutory entities. This we are unwilling to do, and therefore hold that RTI's argument is unavailing.

B.

Additionally, RTI contends that the Tucker Act's waiver of sovereign immunity should extend to the Board. RTI asserts that, because the Board's governing statutes do not explicitly preclude Congress from funding the Board in an emergency, the Board should be considered an appropriations-funded agency and thus fall within the Tucker Act's waiver. However, 12 U.S.C. § 244 clearly states that the money used to fund the Board (assessments from Federal Reserve banks) "shall not be construed to be Government funds or appropriated moneys."[21] And in any event, the only authority for the proposition that Tucker Act jurisdiction exists when Congress could appropriate money for an entity states that jurisdiction does not exist when there is "a clear expression by Congress that the agency was to be separated from general federal revenues."[22] As there is such a "clear expression" in this case, we hold that the Board is not

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[20]Id. at § 341 (West 1987).

[21]Id. at § 244.

[22]L'Enfant Plaza Properties, Inc. v. United States, 668 F.2d 1211, 1212 (Ct. Cl. 1982).

within the Tucker Act's waiver of sovereign immunity.

Further, even if we were to hold that there was jurisdiction under the Tucker Act, a district court in this circuit would not have jurisdiction over RTI's claim. Rather, such a claim would have to be brought in United States Court of Federal Claims. However, as we hold that the Tucker Act does not waive the Board's sovereign immunity, that question is not dispositive here.

C.

RTI alternatively argues that the Board's sovereign immunity is impliedly waived. In so doing, RTI proceeds on two grounds. First, RTI cites United States v. Winstar Corp.[23] for the proposition that sovereign immunity should not be used to frustrate the reasonable expectations of private parties who contract with the government. However, as the Board indicates in its brief, Winstar did not involve the waiver of sovereign immunity. Rather, immunity in that case had been clearly waived, and the question before the Court involved the "unmistakeability doctrine," which regards the sovereign's ability to limit its own preexisting powers.

No such "unmistakeability" question is at issue here. Additionally, although the language from Winstar regarding the reasonable expectations of private parties who deal with the government and the desirability of "the Government's credibility at the bargaining table"[24] may be compelling, it is nevertheless in direct conflict with the law's demand that there be a clear waiver of sovereign immunity. While it may be

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[23]116 S.Ct. 2432 (1996).

[24]United States v. Winstar Corp. , 116 S.Ct. 2432, 2459 (1996).

inequitable that the Board cannot be sued on contracts into which it enters, we recognize that the determination of the propriety of this arrangement is for Congress, not for us. As Chief Justice Vinson wrote in Larson v. Domestic & Foreign Commerce Corp.:

> We do not doubt that there may be some activities of the Government which do not require such [sovereign immunity] protection. There are others in which the necessity of immunity is apparent. But it is not for this Court to examine the necessity in each case. That is a function of the Congress.[25]

Therefore, we find Winstar inapplicable to this case.

We are also unpersuaded by RTI's argument that an implied waiver should be found in the Board's governing statutes. In its reply brief, RTI cites a 1992 amendment to 12 U.S.C. § 248 which states that:

> The Board may act in its own name and through its own attorneys in enforcing any provision of this title, regulations promulgated hereunder, or any other law or regulation, or in any action, suit, or proceeding to which the Board is a party....[26]

This provision, RTI argues, amounts to the "functional equivalent" of a waiver of sovereign immunity in that it "recognizes that the Board can be a party to a legal action in its

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[25]Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 704- 05 (1949).

[26]12 U.S.C.A. § 248(p) (1989 & West Supp.1997).

own name."[27] Again, while this argument may be compelling, it cannot withstand the requirement that a waiver of sovereign immunity be clear, express, and unequivocal. By its very nature, an argument of implicitness or equivalence is one that comprises a recognition of the ambiguity of the matter asserted, and as such ambiguities regarding sovereign immunity must be resolved in favor of the sovereign,[28] we cannot use it as a ground for a waiver. Fidelity to the clear authority of sovereign immunity jurisprudence demands otherwise. Therefore, we hold that the Board's governing statutes do not waive the Board's immunity from suit in contract.

III.

Based on the foregoing, we hold that the district court correctly found that the Board cannot be sued in contract in federal court.[29] Accordingly, we affirm the district court's dismissal of this case.

AFFIRMED

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[27]Appellant's Reply Br. at 4.

[28] Lane, 116 S.Ct. at 2096.

[29]Nevertheless, we also recognize, as does the Board (Appellee's Br. at 13), that the Board is not immune to certain non-contract claims, as Congress has waived the Board's immunity from suit through statutes like the Federal Tort Claims Act. See 28 U.S.C.A. § 1346(b)(1993 & West Supp.1997).

APPENDIX B- DISTRICT COURT OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT FILED FEBRUARY 14, 1997

RESEARCH TRIANGLE INSTITUTE, Plaintiff,
v.
BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, and The United States of America, Defendants.

Civil No. 1:96CV102.

United States District Court,
M.D. North Carolina,
Durham Division.

Feb. 14, 1997.

Federal contractor brought action against Board of Governors of the Federal Reserve System and the United States, seeking reimbursement for unforeseen costs incurred while performing firm fixed price contract it had entered with Board. United States and Board filed motion to dismiss. The District Court, Bullock, Chief Judge, held that sovereign immunity barred action.

Motion granted.

Robinson O. Everett, Everett & Everett, Durham, NC, Grace C. Boddie, Research Triangle Institute, Research Triangle Park, NC, for plaintiff.

Bradford S. Fleetwood, Washington, DC, for Bd. of Governors of the Federal Reserve System.

Gill P. Beck, Office of U.S. Attorney, Greensboro, NC, for defendant U.S.

MEMORANDUM OPINION

BULLOCK, Chief Judge.

Plaintiff Research Triangle Institute ("RTI") filed this action against the Board of Governors of the Federal Reserve System ("Board") and the United States of America seeking reimbursement for unforeseen costs Plaintiff incurred while performing a firm fixed price contract it entered with the Board. This matter is now before the court on Defendants' motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, and for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons set forth hereafter, the court will grant Defendants' motion to dismiss for lack of subject matter jurisdiction, making it unnecessary to consider whether Plaintiff has stated a claim upon which relief can be granted.

FACTS

The Board is a seven member federal agency established under the Federal Reserve Act, 12 U.S.C. § 221 et seq., to supervise and regulate the banks that comprise the Federal Reserve System. On November 3, 1987, the Board issued a Request for Proposal ("RFP") to solicit bids for a survey to determine the institutional sources and geographic areas from which small businesses obtain financial services. The RFP contained performance specifications and a suggested survey design for conducting interviews of selected small businesses.

Plaintiff RTI, a non-profit corporation organized by the University of North Carolina at Chapel Hill, Duke University,

and North Carolina State University to examine complex research issues in various scientific, technical, and social subjects, was one of the bidders that submitted a proposal to the Board. On February 2, 1988, the Board awarded Plaintiff a firm fixed price contract for $572,763 to conduct the research survey.[1] This contract was awarded to Plaintiff based on its cost proposal as well as its 29 years of contract research experience. Plaintiff completed the survey in September 1989 but was unable to meet the targets included in the contract's performance specifications. Nonetheless, the Board paid Plaintiff the full contract price.

Prior to the completion of the contract, Plaintiff submitted a written request on May 24, 1989, to the Board's contracting officer for an equitable adjustment of $284,079. After this request was denied, Plaintiff unsuccessfully appealed the decision to the Board. The equitable adjustment request now serves as the basis for the action before this court. Defendants maintain that this court does not have subject matter jurisdiction to hear this dispute because of the sovereign immunity doctrine. Defendants also contend that Plaintiff assumed the risk of any unanticipated costs after agreeing to a firm fixed price contract. Finally, Defendants assert that all of the changes in the contract for which Plaintiff now seeks compensation were accounted for in the contract modifications agreed to by both parties.

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[1]Although the original contract price was $572,763, four modifications to the contract increased the price to $615,851. The modifications increased the length of each interview, increased the number of questions and interviews, allowed the Board to work closely with RTI in developing the questionnaire, eliminated some of the performance specifications, and extended the contract deadline.

DISCUSSION

In an action against the United States or one of its agencies, a federal court may not exercise jurisdiction absent a clear waiver of sovereign immunity. Federal Deposit Insurance Co. v. Meyer, 510 U.S. 471, 475, 114 S.Ct. 996, 1000, 127 L.Ed.2d 308 (1994); United States v. Mitchell, 445 U.S. 535, 538, 100 S.Ct. 1349, 1351-52, 63 L.Ed.2d 607 (1980). A waiver of immunity must be unequivocally expressed by Congress in the statutory text and "will be strictly construed, in terms of its scope, in favor of the sovereign." Lane v. Pena, 518 U.S. 187, ----, 116 S.Ct. 2092, 2096, 135 L.Ed.2d 486 (1996). The party bringing suit against the federal government or its agencies bears the burden of directing the court to such a clear and explicit waiver. Williams v. United States, 50 F.3d 299, 304 (4th Cir.1995).

In this case, therefore, the court begins its analysis with the premise that sovereign immunity shields the United States and the Board from suit. Congress has waived sovereign immunity for some contract claims against the federal government and its agencies under the Tucker Act, 28 U.S.C. § 1491, and the Contract Disputes Act ("CDA"), 41 U.S.C. § 601 et seq. However, as Plaintiff correctly notes, neither of these statutes applies to the Board. Under both the Tucker Act and the CDA, Congress has restricted the Federal Claims Courts' jurisdiction to contractual obligations paid out of appropriated funds with certain limited exceptions.[2] Because

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[2]Under 28 U.S.C. § 2517(a), judgments rendered by the United States Courts of Federal Claims must be paid out of appropriated funds. Thus, with the exception of military exchanges pursuant to amendment, the Tucker Act only waives sovereign immunity for contract actions that may obligate appropriated funds. McDonald's Corp. v. United States, 926 F.2d 1126, 1129 (Fed.Cir.1991); see also United States v. Hopkins, 427 U.S. 123, 126, 96 S.Ct. 2508, 2510-11, 49 L.Ed.2d 361 (1976) (recognizing that

Congress has provided that the Board's funds "shall not be construed to be Government funds or appropriated moneys," 12 U.S.C. § 244, [3] these statutes would act as a waiver of the Board's immunity only if the Board fell within the narrow class of exceptions. The limited exceptions in which Congress has waived sovereign immunity for contractual obligations paid out of nonappropriated funds, however, include only the military exchanges enumerated in section 1491(a)(1) of the Tucker Act. Thus, Congress did not expressly waive the Board's sovereign immunity in the Tucker Act or the CDA.

Although the Board does not fall within the jurisdiction of either the Tucker Act or the CDA, Plaintiff contends that it is unnecessary for this court to shield NAFI's from suit under the sovereign immunity doctrine because these entities would not expend public money to satisfy judgments awarded against them. With regard to whether immunity is needed to protect the Board, the Supreme Court has recognized that "it is not for this Court to examine the necessity in each case. That is a function of Congress." Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 704, 69 S.Ct. 1457, 1468, 93 L.Ed. 1628 (1949).

An examination of the legislative history surrounding the

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the purpose of the 1970 amendment to the Tucker Act was to provide a remedy to those who contract with the nonappropriated fund instrumentalities ("NAFI") listed in 28 U.S.C. § 1491). In the CDA, Congress elected to limit jurisdiction over NAFI's in the Federal Claims courts to the extent allowed under the Tucker Act. See 41 U.S.C. § 602(a).

[3]A federal agency that does not receive money by congressional appropriation is classified as a NAFI. Hopkins, 427 U.S. at 125 n. 2, 96 S.Ct. at 2510 n. 2.

1970 amendment to the Tucker Act indicates that Congress did not intend to waive sovereign immunity in all contract actions involving NAFI's. The House Judiciary Committee rejected such a proposal because "the complete removal of sovereign immunity for all non-appropriated fund activities would be undesirable." H.R.Rep. No. 933, 91st Cong., 2d Sess. 1-5 (1969), reprinted in, 1970 U.S.C.C.A.N. 3477, 3477-79. Accordingly, Congress did not waive sovereign immunity in contract actions involving the Board, a NAFI not expressly enumerated in the amendment to the Tucker Act. See Wolverine Supply, Inc. v. United States, 17 Cl.Ct. 190, 192-93 n. 4 (1989) ("An analysis of the complete legislative history of the 1970 amendment to 28 U.S.C. § 1491 makes it clear that Congress intended that sovereign immunity was to remain as to all nonappropriated fund instrumentalities except for military exchanges....").

Because Congress did not intend to waive sovereign immunity in all contract claims against NAFI's under either the Tucker Act or the CDA, this court must apply the sovereign immunity doctrine unless Plaintiff is able to direct the court to an unequivocal waiver of the Board's immunity by Congress.[4] In this case, Plaintiff has failed to bring such a

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[4]Plaintiff asserts that the General Counsel to the Board waived the sovereign immunity defense in a May 15, 1990, letter to RTI stating that "[i]f you wish to pursue your claim, you may file a complaint with the appropriate federal district court." (Pl.'s Br. Opp'n to Mot. to Dismiss Ex. P.) However, "[i]t is well established that the United States cannot be sued without its specific statutory consent and that no government officer by his action can confer jurisdiction otherwise lacking." Champaign-Urbana News Agency, Inc. v. J.L. Cummins News Co., 632 F.2d 680, 687 (7th Cir.1980). See also Wolverine Supply, 17 Cl.Ct. at 193 n. 7 (noting that a contracting officer did not have authority to waive congressional limitations on the court's jurisdiction). Thus, this statement is insufficient to waive the Board's sovereign immunity.

waiver to the court's attention.

Plaintiff contends that federal question jurisdiction is proper in this court based on 28 U.S.C. § 1331 and 12 U.S.C. § 632. However, neither of these provisions unequivocally waives sovereign immunity in contract actions against the federal government and its agencies. First, with regard to 28 U.S.C. § 1331, "[t]he federal question jurisdictional statute is not a general waiver of sovereign immunity; it merely establishes a subject matter that is within the competence of federal courts to entertain." Whittle v. United States, 7 F.3d 1259, 1262 (6th Cir.1993). Second, 12 U.S.C. § 632 cannot provide a basis for federal question jurisdiction because the statute grants federal district courts original jurisdiction only in suits to which any Federal Reserve Bank is a party. Here, Plaintiff has instituted its action against the Board, an entity clearly separate from the Federal Reserve Banks ("Banks").

Plaintiff argues that its contract with the Board is, in essence, a contract with the collective Banks subject to 12 U.S.C. § 632. Plaintiff comes to this conclusion by reasoning that the Board acts as an agent for the Banks by committing funds of the twelve Banks when it executes contracts. See id. § 243 (authorizing the Board to levy assessments upon the Banks to pay expenses). However, the Federal Reserve Act clearly contemplates treating the Board and the Banks as distinct entities by defining them separately. Id. § 221. Furthermore, Congress explicitly waived sovereign immunity for the Banks by providing "sue and be sued" authority when outlining the Banks' powers. Id. § 341. When enumerating the powers and authority of the Board, by contrast, Congress did not provide any similar language. See id. § 248. Consequently, Plaintiff's

attempt to include the Board in the congressional waiver of the Banks' sovereign immunity is without merit, and this court does not have subject matter jurisdiction over the Board.

CONCLUSION

For the reasons stated above, the court will grant Defendants' motion to dismiss for lack of subject matter jurisdiction.

An order in accordance with this memorandum opinion shall be entered contemporaneously herewith.

ORDER

For the reasons set forth in the memorandum opinion filed contemporaneously herewith,

IT IS ORDERED that Defendants' motion to dismiss [# 5] is GRANTED, and this civil action be, and the same hereby is, DISMISSED.

Supreme Court, U.S.
FILED
JUN 29 1998
CLERK

No. 97-1759

In the Supreme Court of the United States

OCTOBER TERM, 1997

RESEARCH TRIANGLE INSTITUTE, PETITIONER

v.

THE BOARD OF GOVERNORS OF
THE FEDERAL RESERVE SYSTEM AND
THE UNITED STATES OF AMERICA

*ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT*

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether Congress has waived the government's sovereign immunity with respect to petitioner's suit in federal district court against the Federal Reserve Board for contract damages.

In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1719

RESEARCH TRIANGLE INSTITUTE, PETITIONER

v.

THE BOARD OF GOVERNORS OF
THE FEDERAL RESERVE SYSTEM AND
THE UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 132 F.3d 985. The opinion of the district court (Pet. App. 13a-21a) is reported at 962 F. Supp. 61.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1997. On March 20, 1998, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including April 28, 1998, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In November 1987, respondent the Board of Governors of the Federal Reserve System (the Board) requested bids on a contract to conduct a survey to determine the institutional sources and geographic areas from which small businesses obtain financial services. In February 1988, the Board selected petitioner to perform the survey for a fixed price of $572,763. Agreed modifications later increased the contract price to $615,851. In May 1989, the Board's staff denied petitioner's request for a further increase of $284,079. The Board rejected petitioner's administrative appeal of that decision in February 1990. Pet. App. 4a, 15a-16a & n.1.

In February 1996, petitioner filed this suit in district court seeking damages from the Board and the United States for breach of contract. See Pet. App. 4a, 16a. Petitioner contended that the court had jurisdiction under 28 U.S.C. 1331, which confers jurisdiction over "civil actions arising under the * * * laws * * * of the United States," and 12 U.S.C. 632, which provides that any civil case "to which any Federal reserve bank shall be a party shall be deemed to arise under the laws of the United States." See Pet. App. 20a. The court rejected that argument, holding that Section 1331 did not embody a general waiver of sovereign immunity, and that Section 632's grant of jurisdiction over suits involving reserve banks could not be extended to the "clearly separate" entity of the Board. *Id.* at 20a-21a. The court further agreed with petitioner's concession that neither the Tucker Act, 28 U.S.C. 1491, nor the Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.*, applied to the Board; and it rejected petitioner's argument that, because any

judgment against the Board would be paid out of funds that were not directly appropriated by Congress, sovereign immunity should not apply to the Board. Pet. App. 17a-19a. The court accordingly granted the government's motion to dismiss petitioner's complaint for lack of subject matter jurisdiction. *Id.* at 21a.

The court of appeals affirmed. Pet. App. 1a-12a. The court first observed that the sovereign immunity of the United States and its instrumentalities "is presumed and cannot be overcome without an express and unequivocal statutory waiver," and that any such waiver is to be "strictly construed, with all ambiguities resolved in favor of the sovereign." *Id.* at 4a-6a. The court then rejected petitioner's argument, made for the first time in the court of appeals, that, because of the Board's relationship to the various federal reserve banks, "the Board, for which there is no express statutory waiver of immunity, should be included within the waiver for the [reserve banks] provided by 12 U.S.C. § 341." *Id.* at 7a-9a.[1] Noting that the Board and the reserve banks it oversees are created and empowered by separate statutory provisions, the court refused to "conflate the powers of two expressly independent statutory entities." *Id.* at 8a-9a.

The court also rejected (Pet. App. 9a-10a) petitioner's argument that the Tucker Act, which authorizes suits on contract claims for damages against the United States (see 28 U.S.C. 1491(a)(1)), should ex-

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[1] Section 341 enumerates the general powers conferred by Congress on federal reserve banks, including the power "[t]o sue and be sued, complain and defend, in any court of law or equity."

tend to suits against the Board. First, the court reasoned that the Tucker Act generally confers jurisdiction only over suits against "agencies that operate using [congressionally] appropriated funds" (Pet. App. 6a), and the Board is not such an agency because 12 U.S.C. 244 "clearly states that the money used to fund the Board (assessments from Federal Reserve banks) 'shall not be construed to be Government funds or appropriated moneys'" (*id.* at 9a). Second, the court pointed out (*id.* at 10a) that even if the Tucker Act did apply to suits against the Board, it would confer jurisdiction only on the Court of Federal Claims and not on the instant suit in federal district court.

Finally, the court declined to find an implied waiver of sovereign immunity permitting suits against the Board, arising either from the logic of this Court's decision in *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996), or from Congress's grant of independent litigating authority to the Board in 12 U.S.C. 248(p). The court rejected petitioner's claim that *Winstar* established the broad proposition "that sovereign immunity should not be used to frustrate the reasonable expectations of private parties who contract with the government," noting that *Winstar* "did not involve the waiver of sovereign immunity," which "had been clearly waived" in that case. Pet. App. 10a. And the court found that the statutory authority of the Board to "act in its own name and through its own attorneys" in various legal proceedings did not constitute the sort of "clear, express, and unequivocal" waiver of sovereign immunity that would be necessary to confer jurisdiction over a suit against the Board. *Id.* at 11a-12a.

ARGUMENT

The court of appeals correctly held that no statute waives the government's sovereign immunity with regard to a contractor's suit in federal district court for money damages arising out of a contract with the Federal Reserve Board. The court's decision created no new law in this area and does not conflict with any decision of this Court or of any other court of appeals. The petition therefore presents no issue warranting this Court's review.

1. Petitioner first contends (Pet. 6-9) that the usual principles of sovereign immunity, requiring a "clear, express, and unequivocal" waiver of immunity before a suit may proceed against the United States or one of its instrumentalities, do not apply in cases involving "'commercial' contracts of governmental agencies" (Pet. 6). That is not correct. In contract cases, as in all others, "the United States, as sovereign, is immune from suit save as it consents to be sued[,] and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *Hercules, Inc.* v. *United States*, 516 U.S. 417, 422 (1996) (internal quotation marks and ellipsis omitted); *United States* v. *Sherwood*, 312 U.S. 584 (1941); see also, *e.g.*, *Kiowa Tribe* v. *Manufacturing Technologies, Inc.*, 118 S. Ct. 1700 (1998) (Indian Tribe's sovereign immunity bars suit for breach of commercial contract); *In re Ayers*, 123 U.S. 443, 505 (1887) (because of sovereign immunity, a "contract [with a State] is substantially without sanction, except that which arises out of the honor and good faith of the state itself, and these are not subject to coercion").

Petitioner cites cases involving statutory "sue and be sued" clauses, which the Court has generally construed as broad waivers of sovereign immunity. See *FDIC* v. *Meyer*, 510 U.S. 471, 475-483 (1994); *Loeffler* v. *Frank*, 486 U.S. 549 (1988); *Federal Housing Administration* v. *Burr*, 309 U.S. 242 (1940). As this Court has observed, however, those cases "do not * * * eradicate the traditional principle that the Government's consent to be sued must be construed strictly in favor of the sovereign, and not enlarge[d] . . . beyond what the language requires." *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 34 (1992) (internal quotation marks and citation omitted). The critical question in this case is therefore not whether the Board entered into a "'commercial' contract[]" with petitioner (Pet. 6), but whether Congress has expressly made the Board amenable to suit.

Petitioner concedes (Pet. 10) that the statutory provisions governing the Board do not contain a "sue and be sued" clause. It contends, however, that the general provisions of the Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.*, and the authority to "sue and be sued" conferred by statute on individual federal reserve banks, 12 U.S.C. 341 (Fourth), should be "construed together" to preclude the Board from asserting sovereign immunity as a defense to an action for breach of contract. Pet. 12-13.

The statutory provisions on which petitioner relies do not support its waiver argument. If the Contract Disputes Act applied to this case, it would authorize only an action in the Court of Federal Claims (brought within 12 months of an adverse decision by a contracting officer), or review of the decision of an agency board of contract appeals by the Court of Appeals for the Federal Circuit (brought within 120

days of the agency board's decision). 41 U.S.C. 607(g), 609(a); see 28 U.S.C. 1491(a)(1). Petitioner filed this action in district court, some six years after the Board's final denial of its request for administrative relief.

Nor can a waiver of the Board's immunity be derived from the authority of individual Federal Reserve banks to "sue and be sued," 12 U.S.C. 341, because, as the court of appeals recognized (Pet. App. 8a), the Board "has an expressly independent statutory existence from the Federal Reserve banks it oversees."[2] Indeed, the fact that Congress expressly gave the individual banks the power to "sue and be sued", 12 U.S.C. 341, supports the conclusion that Congress intentionally withheld that power from the Board when it enumerated the Board's powers elsewhere in the same Act, 12 U.S.C. 248. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Brown* v. *Gardner*, 513 U.S. 115, 120 (1994), quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (internal quotation marks omitted).

Petitioner can point to no statutory waiver of sovereign immunity that applies to this proceeding.[3] The

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[2] The Board is a regulatory entity established by, and granted enumerated powers in, Sections 10 and 11 of the Federal Reserve Act, ch. 6, 38 Stat. 260, 261 (1913), codified (as amended) at 12 U.S.C. 241-248. The federal reserve banks are federally chartered corporate entities whose existence and powers are governed by separate provisions of the Act, codified (as amended) at 12 U.S.C. 281-360.

[3] The Board is subject to suit in certain cases, not relevant here, under general congressional waivers of sovereign immu-

court of appeals therefore correctly affirmed the district court's dismissal of petitioner's suit for lack of jurisdiction.

2. The decision below does not conflict with either *McDonald's Corporation* v. *United States*, 926 F.2d 1126 (Fed. Cir. 1991), or *L'Enfant Plaza Properties, Inc.* v. *United States*, 668 F.2d 1211 (Ct. Cl. 1982). See Pet. 13-16. Neither of those cases involved the Board; and both involved construction of the Tucker Act, 28 U.S.C. 1491, which is not applicable to this case for reasons set forth in note 3, *supra*. Moreover, the reasoning of each case fails to support petitioner's claim.

McDonald's held that when Congress expressly authorized suits against "Navy Exchanges" for contract damages under the Tucker Act, it implicitly also authorized such suits against the Navy Resale and Services Support Office (NAVRESSO), a "'central management office' for the Navy resale system."

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nity. See 5 U.S.C. 701 (Administrative Procedure Act); 28 U.S.C. 1346(b), 2671 *et seq.* (Federal Tort Claims Act). The Tucker Act, 28 U.S.C. 1491, which grants the Court of Federal Claims jurisdiction over various non-tort claims against the government, does not confer jurisdiction here for two reasons. First, it has been construed not to extend, absent some specific statutory provision, to contract claims against instrumentalities that are not funded through congressional appropriations. See *United States* v. *Hopkins*, 427 U.S. 123, 125 & n.2 (1976). The Board is not funded through appropriations, see 12 U.S.C. 243-244 (Board to be funded by assessments on reserve banks, which "shall not be construed to be Government funds or appropriated moneys"), and no special jurisdictional provision applies. See 28 U.S.C. 1491(a)(1). Second, as in the case of the Contract Disputes Act, even if the Tucker Act were applicable it would confer jurisdiction only on the Court of Federal Claims and not on the district court. See 28 U.S.C. 1346(a)(2).

926 F.2d at 1127, 1129, 1133. The court found that NAVRESSO was the functional equivalent of the purchasing arm of the Navy Exchanges. Nothing in that decision compels the conclusion that the Federal Reserve Board is likewise merely an arm of the Federal Reserve Banks which it regulates, or conflicts with the conclusion of the court below that the Board and the banks are "two expressly independent statutory entities" so that a waiver of immunity for the banks does not extend to the Board. Pet. App. 9a.

L'Enfant Plaza Properties held that while the Tucker Act waiver of immunity generally extends only to agencies that spend appropriated funds (and to certain other agencies identified by name, such as the Navy Exchanges), that limitation did not shield the Comptroller of the Currency from suit, because funding of the Comptroller's activities was not sufficiently clearly "separated from general federal revenues." 668 F.2d at 1212. Whatever the merits of that decision, its reasoning does not, as the court of appeals recognized (Pet. App. 9a-10a), compel the same conclusion with respect to the Board, which is governed by very different statutory provisions. Compare, *e.g.*, 12 U.S.C. 1 ("There shall be in the Department of the Treasury a bureau * * * the chief officer of which * * * shall be called the Comptroller of the Currency, and shall perform his duties under the general directions of the Secretary of the Treasury.") with 12 U.S.C. 241 (creation of Board as independent entity); see also 668 F.2d at 1212 (noting that the Comptroller's Office received appropriations through 1947).

Moreover, as the court below also observed (Pet. App. 10a), the reasoning of *L'Enfant Plaza Properties*

could at most justify an assertion of jurisdiction only by the Court of Federal Claims in a case brought under the Tucker Act, not by a district court in a case brought under 28 U.S.C. 1331.

CONCLUSION

The petition for a writ of certiorari should be denied.

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No. 97-1759

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

RESEARCH TRIANGLE INSTITUTE,
Petitioner,

v.

THE BOARD OF GOVERNORS OF
THE FEDERAL RESERVE SYSTEM AND
THE UNITED STATES OF AMERICA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONER'S REPLY MEMORANDUM

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14 pp

TABLE OF CONTENTS

Page

Table of Authorities ii

Petitioner's Reply Memorandum 1

I 1

II 5

Conclusion 10

TABLE OF AUTHORITIES

Page

CASES

Bowen v. Massachusetts, 487 U.S. 879, 910, 108 S. Ct. 2722, 2740 (1988) 9

Federal Deposit Ins. Co. v. Meyer, 510 U.S. 471 (1994) 2

Federal Hous. Auth. v. Burr, 309 U.S. 242 (1944) 2

Keifer & Keifer v. Reconstruction Fin. Corp., 306 U.S. 381 (1939) 2

Kiowa Tribe of Oklahoma v. Manufacturing Techs., Inc., __ U.S. __, 118 S. Ct. 1700 (1998) 4

Loeffler v. Frank, 486 U.S. 549 (1988) 2

L'Enfant Plaza Properties, Inc. v. United States, 668 F.2d 1211 (Ct. Cl. 1982) 5, 6, 7

McCloskey v. United States, 530 F.2d 374, 377 (Ct. Cl. 1976) 7

McDonald's Corp. v. United States, 926 F.2d 1126 (Fed. Cir. 1991) 5, 6, 7

Taydus v. Cisneros, 902 F. Supp. 278, 287 (D. Mass. 1995) 9

Town of No. Bonneville, Wash. v. U.S. Dist. Ct., 732 F.2d 747, 751 (9th Cir. 1984) 9

United States v. Winstar Corp., 518 U.S. 839 (1996) . 4-5

STATUTES

2 D.C. Code § 1727 7

5 U.S.C. § 104 5

12 U.S.C. § 248 4

12 U.S.C. § 248(p) 4

12 U.S.C. § 341 . . . . . 2, 3

28 U.S.C. § 1292(d)(4) 8

28 U.S.C. § 1331 7

28 U.S.C. § 1346(a)(2) 8

28 U.S.C. § 1491 5

28 U.S.C. § 1631 . . . . . 7, 8, 9

41 U.S.C. § 601 5

MISCELLANEOUS

17 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4101 (2d ed. 1988) 8

House Conf. Rep. No. 103-652, reprinted in U.S.C.C.A.N., p. 1977 at 2008 (1994) 4

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PETITIONER'S REPLY MEMORANDUM

In their Brief in Opposition to the Petition for Certiorari, Respondents argue that the decision of the court below did not conflict with a) decisions of this Court, or b) decisions of any court of appeals. In each instance, their Brief fails to prove the point; and instead it is clear that these conflicts exist which the Court should review.

I.

Petitioner is seeking to recover the extra costs it incurred under its contract with respondent Board because of major changes the Board made in the contract specifications while it was being performed. This contract was for the performance of a survey for the benefit of the twelve Federal Reserve Banks, which are regulated by the Board. Had the contract been with a Federal Reserve Bank, instead of with the Board, a District Court would clearly have jurisdiction because Congress has specifically authorized the Reserve Banks to "sue and be sued."[1] When the relationship between the Board and the Reserve Banks is considered in context, the circumstance that the Board was the nominal contracting party did not preclude the District Court from having jurisdiction over the suit.

Petitioner's brief cited three cases which held that when an entity created by Congress enters into "commercial" contracts, a waiver of sovereign immunity should be construed liberally. *See Federal Deposit Insurance Company v. Meyer*, 510 U.S. 471 (1994); *Loeffler v. Frank*, 486 U.S. 549 (1988); *Federal Housing Authority v. Burr*, 309 U.S. 242 (1944). The respondent Board seeks to distinguish those cases because they involved "sue and be sued" clauses. However, the opinions in those cases do not purport to limit the applicability of their governing principles to only those waivers manifested by a "sue and be sued" clause in a governing statute. Their language is broader. For example, *Burr* cites *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381 (1939) for the "premise that such waivers by Congress of governmental immunity in case of such federal instrumentalities should be liberally construed." 309 U.S. at

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[1] *See* 12 U.S.C. § 341.

245. Moreover, in *Burr* the suit was successfully maintained against the "Federal Housing Administration," even though the power to "sue and be sued" had been granted by Congress to the "Federal Housing Administrator."

As pointed out in the petition for certiorari, there are several statutory provisions which, when "liberally construed," mandate the conclusion that any sovereign immunity of the respondent Board has been waived as to Petitioner's claim. The Board provides for its anticipated expenses by semi-annual assessments against the Federal Reserve Banks. (Pet. 4.) These Banks, whose operating funds are non-appropriated, have been authorized to "sue and be sued."[2] Thus, a waiver of sovereign immunity has taken place as to the funds held by these Reserve Banks -- the funds from which Congress contemplated that the respondent Board would obtain its financial support.[3] Petitioner submits that, when "liberally construed," the waiver of sovereign immunity as to the principal source of funds for the Board of Governors was the functional equivalent of waiving any sovereign immunity of the Board itself with respect to the "commercial" contract on which Petitioner has brought suit.[4] This result flows naturally from applying the principle that the various

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[2] *See id.*

[3] However, as noted later in this Memorandum, Congress did not preclude the appropriation of funds for the Board if this was determined to be necessary or desirable.

[4] Although the saying "show me the money" is not a legal principle, it helps focus on the underlying fact tha: Congress did clearly waive sovereign immunity with respect to funds obtained from fees charged by Federal Reserve Banks to member banks of the Federal Reserve System created by Congress. When those funds have once been placed at risk by that waiver, the doctrine of sovereign immunity should not thereafter be applied to them.

statutory provisions applicable to the Federal Reserve System be taken as a whole and construed together in light of their underlying principles. For example, Congress has clarified the powers of the Board of Governors (codified at 12 U.S.C. § 248) by adding subsection (p), which clearly contemplates suits by and against the Board and which states: "The Board may act in its own name and through its own attorneys ... in any action, suit, or proceeding to which the Board is a party and which involves," *inter alia*, "the administration of its operations."[5] The Conference Report on this legislation, which makes clear that the term "administration of its operations" was intended to include "personnel and contract disputes," reveals unmistakably that Congress assumed that the Board could be a party to litigation and believed that sovereign immunity had been waived with respect to contracts such as that entered by the Board with Petitioner RTI.[6]

Respondents cite *Kiowa Tribe of Oklahoma v. Manufacturing Techs., Inc.*, __ U.S. __, 118 S. Ct. 1700 (1998). However, the Opinion of the Court in that case by its own admission perpetuated an anachronism and involved tribal sovereign immunity, which is like the immunity of a foreign sovereign and provides no guidance for the present case. Respondents dispute the applicability of *United States*

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[5] Pub. L. No. 103-325, Title III, § 331(d), 108 Stat. 2160, 2232 (Sept. 23, 1994) (codified at 12 U.S.C. § 248(p)).

[6] The Conference Report submitted prior to passage of that act explained, "[T]he authority granted with respect to 'the administration of its operations' should be construed to include only *its internal regulatory operations, such as personnel and contract disputes*, and not to include administrative matters unrelated to bank regulatory activities, such as Freedom of Information Act requests for monetary policy information." House Conf. Rep. No. 103-652, reprinted in U.S.C.C.A.N., p. 1977 at 2008 (1994) (emphasis added).

v. Winstar Corp., 518 U.S. 839 (1996); but even though that case involved the doctrine of "sovereign act," rather than "sovereign immunity," its result and the principles stated there in the plurality opinion are inconsistent with the narrow interpretation of waiver adopted by the court below and advocated by the respondents.

The Court should grant review to settle the conflict between older precedents espousing strict construction of waiver of sovereign immunity and the more current decisions which "liberally construe" waiver of sovereign immunity when the United States, its "executive agencies,"[7] and its "independent establishments"[8] enter into business-type transactions. Thereby guidance will be provided both for the lower courts and for persons in the private sector as to whether good faith and fair dealing may be assumed in dealing with government entities.

II.

Consistent with its understanding of the purposes of the Tucker Act, 28 U.S.C. § 1491 (1994), the United States Court of Federal Claims -- and previously the United States Court of Claims -- has held the United States liable for contracts entered by a government-related entity for which sovereign immunity had not been expressly waived. *See McDonald's Corp. v. United States*, 926 F.2d 1126 (Fed. Cir. 1991); *L'Enfant Plaza Properties, Inc. v. United States*, 668 F.2d 1211 (Ct. Cl. 1982). The respondents seek to distinguish those cases, but they are in conflict with the case at hand.

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[7] *See* 41 U.S.C. § 601.

[8] *See* 5 U.S.C. § 104.

In *McDonald's*, the contract was entered by NAVRESSO, an organization which acted for the benefit of Navy Exchanges -- military-related entities as to which the Tucker Act, as amended, has specifically waived liability. *See McDonald's*, 926 F.2d at 1129. Respondents maintain that NAVRESSO, which was a "'central management office' for the Navy resale system" and was "the functional equivalent of the purchasing arm of the Naval Exchanges" should be distinguished from the Federal Reserve Board, which regulates the Reserve Banks. However, the contract which the Board entered with Petitioner was a purchase of the services and skills of Petitioner and its employees to conduct a survey for the benefit of the Federal Reserve Banks. Indeed, the Board centrally determined what were the needs of the Reserve Banks with respect to the survey and managed the performance of the survey. Although Respondents claim that the Board and the Reserve Banks are "expressly independent statutory entities," they are all part of the single integrated Federal Reserve System, and the statutory provisions as to that system should be construed *in pari materia*. Moreover, the Board clearly is not "independent" of the Reserve Banks insofar as its operating funds are concerned, because these funds are obtained from the Banks by periodic assessments.

Respondents suggest that the Comptroller of the Currency in *L'Enfant Plaza* can be differentiated from the Board in this case. However, like the Board, the Comptroller's expenses are paid regularly from assessments against the banks over whose activities his or her office has oversight. Moreover, just as is true for the Comptroller, no statutory authorization for expenditure of funds precludes the use of appropriated funds to defray expenses of the Board if the funds levied against the Reserve Banks prove to be insufficient for this purpose. In this regard the situation is quite different from

that in *McCloskey v. United States*, 530 F.2d 374, 377 (Ct. Cl. 1976) -- distinguished by the Court of Claims in *L'Enfant Plaza* -- and involving a statute which specifically prohibited the use of appropriated funds for the benefit of the entity that had entered the contract.[9] In short, *McDonald's* and *L'Enfant Plaza* apply and rely on principles of fair dealing, which are expected in transactions with the United States government or its agencies. The court below, on the other hand, applies sovereign immunity in a manner which violates those principles. It is important that the conflict be resolved.

Respondents conclude their argument by stating that "the reasoning of *L'Enfant Plaza Properties* could at most justify an assertion of jurisdiction only by the Court of Federal Claims in a case brought under the Tucker Act, not by a district court in a case brought under 28 U.S.C. 1331." (Resp. 9-10.) This comment ignores the effect of 28 U.S.C. § 1631, which authorizes transfer of jurisdiction from one

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[9] *See* 2 D.C. Code § 1727 ("Nothing contained in this subchapter shall be construed to authorize or permit the Board or any member thereof to create any obligation or incur any liability other than such obligations and liabilities as are dischargeable solely from funds contemplated to be provided by this subchapter"). The absence of such an express limitation in any statute pertinent to the Board leads to the same conclusion reached in *L'Enfant*.

federal court to another, rather than dismissal, if the former court lacks jurisdiction.[10]

In its brief in the court of appeals, Petitioner pointed out that if that court decided that the district court lacked jurisdiction to entertain the suit against the Reserve Board, it should order the case transferred to the Court of Federal Claims.[11] The same point was made there during oral argument. Under the Tucker Act, the Court of Federal Claims has concurrent jurisdiction with the district courts over contract disputes for monetary damages not exceeding $10,000, *see* 28 U.S.C. § 1346(a)(2), and exclusive jurisdiction over suits in which monetary damages exceed $10,000, unless there is an independent waiver of sovereign

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[10] Section 1631 provides in pertinent part:

> "Whenever a civil action is filed in a court . . . and that court finds that there is a want of jurisdiction, the court *shall, if it is in the interest of justice*, transfer such action ... to any other such court in which the action . . . could have been brought at the time it was filed . . ., and the action . . . shall proceed as if it had been filed in . . . the court to which it is transferred on the date upon which it was actually filed in . . . the court from which it is transferred" (emphasis added).

28 U.S.C. § 1631. *Cf.* 28 U.S.C. § 1292(d)(4), concerning appeal of an order transferring a case to the Court of Federal Claims. *See also* 17 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4101 (2d ed. 1988) ("the Act [creating the Claims Court] authorized any federal Court in which a civil case is filed improperly to transfer the case to a Court in which jurisdiction is proper").

[11] "If the Court concludes that the Board was properly dismissed as a defendant but the United States was not, the case should be transferred to the Court of Federal Claims." (App. Br. 8 n.1.)

immunity as to that claim.[12] Thus, if Petitioner's monetary claim were only for $10,000, the district court would have had jurisdiction over this action. Although a district court lacks jurisdiction under the Tucker Act over suits for more than $10,000, the court "shall" consider transferring the action to the Court of Federal Claims if "in the interest of justice." This language is mandatory and creates a duty in the district court to consider transfer. The court errs if it fails to give that consideration. *See Town of No. Bonneville, Wash. v. U.S. District Court*, 732 F.2d 747, 751 (9th Cir. 1984) ("The District Court erred in dismissing any claims for money damages over which the Court of Claims has jurisdiction without first considering the propriety of transferring them ... to the Claims Court"). Therefore the courts below erred by failing to consider whether it would be "in the interest of justice" to transfer the case to the Court of Federal Claims.

Certainly if the respondent Board is immune from suit and if the United States is liable to Petitioner under the Tucker Act, it is "in the interest of justice" for this case to be transferred to the Court of Federal Claims, rather than to dismiss it.[13] Indeed, any other result would be a clear injustice -- especially since the respondent Board's General Counsel, when informing Petitioner that its administrative remedies had been exhausted, specifically stated, "[i]f you

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[12] The jurisdiction of the Court of Federal Claims "'is 'exclusive' only to the extent that Congress has not granted any other court authority to hear claims that may be decided by the Claims Court.'" *Taydus v. Cisneros*, 902 F. Supp. 278, 287 (D. Mass. 1995) (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 910, 108 S. Ct. 2722, 2740 (1988)).

[13] In that event, the case should be remanded to the district court to enter an order of transfer to the Court of Federal Claims pursuant to 28 U.S.C. § 1631.

wish to pursue your claim, you may file a complaint with the appropriate *federal district court*" (Pet. 5.) (emphasis added).

CONCLUSION

The lower court's opinion conflicts with governing precedents from this Court and with persuasive precedents from other courts of appeal. It is important that this conflict be resolved, and the current confusion removed.[14] Therefore, review should be granted.

Respectfully submitted,

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[14] A prime example of the confusion – and resulting reluctance to deal with government entities – is that the Chief Counsel of the Federal Reserve Board wrote to Petitioner that "you may file a complaint with the appropriate federal district court," but then once the complaint had been filed, the Board asserted sovereign immunity with respect to that complaint.